RECENT CASES

Constitutional Law—Commerce Clause—Validity of Statute Regulating Interstate Transportation of Convict-Made Goods—An Act of Congress forbade the transportation in interstate commerce of goods made by convict labor into any state where such goods were intended to be received or sold in violation of its laws, and in all cases required explanatory labeling of packages containing such goods.[1] Plaintiff tendered unlabeled convict-made goods to the defendant carrier for shipment into states the laws of which prohibited the sale of such goods therein. Upon the defendant's refusal to accept the shipments, in obedience to the Act, action was brought for a mandatory injunction on the ground that the statute was unconstitutional. *Held,* that the Act is a valid regulation of interstate commerce under the Constitution.[2] *Kentucky Whip & Collar Co. v. Illinois C. R. R.,* U. S. Sup. Ct., (1937) 4 U. S. L. WEEK 485.[3]

The instant decision constitutes a most liberal interpretation of the power of Congress to regulate interstate commerce for police purposes.[4] Inasmuch as the goods regulated are physically harmless and of no specified description, and since the only evil to be remedied lies in the subversive economic effect of competition between unpaid or underpaid convict labor and properly compensated free labor,[5] the Act differs from the unconstitutional Child-Labor Law [6] solely in the fact that the present regulation does not positively forbid all interstate transportation of the goods, but merely prohibits such transportation into those states which themselves forbid the sale thereof. Although the professed purpose of the Act is thus only to aid state law enforcement, and not to foist a policy upon the states,[7] and although regulation of this sort is necessary to prevent the operation of the "original package" doctrine from destroying the effectiveness

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1. The Ashurst-Sumners Act, 49 STAT. 494 (1935), 49 U. S. C. A. §§ 61-65 (Supp. 1936).

2. U. S. CONST. Art. I, § 8, cl. 3.

3. The lower court decisions of the same case are to be found in 84 F. (2d) 168 (C. C. A. 6th, 1936), and in 12 F. Supp. 37 (W. D. Ky. 1935).

4. Although the Court cites an impressive array of cases involving the use of a federal police power, the entire doctrine is a comparatively new one, having arisen only in the present century. For a discussion of the earlier cases cited by the Court, see Note (1917) 30 HARV. L. REV. 491.

5. The existence of a true economic evil in the sale of convict-made goods is shown by the fact that a preponderant number of states have laws preventing such sale and that Congress has prohibited the importation of such goods into the United States [46 STAT. 689 (1930), 19 U. S. C. A. § 1307 (Supp. 1936)], as well as the sale of them to the public in competition with private enterprise when made by convicts imprisoned under federal law [46 STAT. 391 (1930), 18 U. S. C. A. § 744c (Supp. 1936)]. See Whitfield v. Ohio, 297 U. S. 431, 439 (1936); Kentucky Whip & Collar Co. v. Illinois C. R. R., 84 F. (2d) 168, 169 (C. C. A. 6th, 1936).

6. 39 STAT. 675 (1916). In Hammer v. Dagenhart, 247 U. S. 251 (1918), this Act, which forbade all interstate transportation of goods manufactured with the aid of child labor, was held unconstitutional as a regulation of the production of the goods involved. It was there said, "It is further contended that . . . authority . . . may be exerted to control interstate . . . shipment of child-made goods because of the effect of the circulation of such goods in other States where the evil of this class of labor has been . . . more vigorously restrained than in the State of production." *Id.* at 273. But power so to deal with the problem was denied. For a penetrating criticism of *Hammer v. Dagenhart* see GAVIT, THE COMMERCE CLAUSE (1932) § 108 (c).

7. Instant case at 487, 488. See also the opinion of the Circuit Court of Appeals in 84 F. (2d) 268, 270 (C. C. A. 6th, 1936).

of the state laws,[8] it must be remembered that in actual fact the major part of the country-wide market for convict-made goods is taken away,[9] and to some extent the production of such goods in states which do not forbid their sale is thus curtailed and a policy is forced upon them. The Court attempted to focus attention [10] on the Acts regulating the interstate transportation of liquor,[11] from which both this and an earlier federal statute on the subject [12] were obviously drawn, as a valid analogy; but such analogy is not entirely correct since the fact remains that in this Act, as in the Child-Labor Law, only a special class of labor is affected, while the regulation extends to no specified kind of goods, but rather to all kinds of goods made by the class affected. Nevertheless, the liquor and convict-goods laws remain the only instances where Congress has successfully legislated to prevent the channels of interstate commerce from being used to impede the carrying out of a valid policy undertaken by only part of the states.

Constitutional Law—Constitutionality of the Unemployment Compensation Tax Imposed by the Social Security Act—The petitioner, a stockholder in the respondent railroad company, sought to enjoin the respondent from making payment to the United States Collector of Internal Revenue as required by Title IX of the Social Security Act, alleging that Title IX is unconstitutional. *Held,* that Title IX is constitutional, because it levies a valid excise within the taxing powers of Congress, falling within the requirements of uniformity and providing for the general welfare. *Davis v. Boston & Maine R. R.,* 17 F. Supp. 97 (D. Mass. 1936), *cert. denied,* U. S. Sup. Ct., (1937) 4 U. S. L. WEEK 477.[1]

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8. For the development and nature of this doctrine by which a sale in the original package is considered still a part of the interstate commerce, although the transportation has in fact terminated, see GAVIT, THE COMMERCE CLAUSE (1932) § 72. It was for the same purpose that an earlier federal law on the subject, the Hawes-Cooper Act, was formulated. 45 STAT. 1084 (1929), 49 U. S. C. A. § 60 (Supp. 1936). Involving quite a different constitutional problem, the Act was upheld in Whitfield v. Ohio, 297 U. S. 431 (1936), but its validity has been vigorously attacked. See Davis, *The Hawes-Cooper Act Unconstitutional* (1930) 23 LAWYER & BANKER 296; Legis. (1931) 44 HARV. L. REV. 846 (also giving a brief history of all state laws on the subject).

9. This is true since more than half the states have laws prohibiting the sale of convict-made goods therein. See *supra* note 5.

10. Instant case at 487.

11. The Wilson Act, 26 STAT. 313 (1890), 27 U. S. C. A. § 121 (Supp. 1936), upheld in *In re* Rahrer, 140 U. S. 545 (1891), and the Webb-Kenyon Act, 37 STAT. 699 (1913), 27 U. S. C. A. § 122 (Supp. 1936), upheld in Clark Distilling Co. v. Western M. Ry., 242 U. S. 311 (1917), correspond almost exactly in wording with the Hawes-Cooper and Ashurst-Sumners Acts respectively. For a discussion of the then new Webb-Kenyon Act, see Note (1917) 17 COL. L. REV. 144. GAVIT, THE COMMERCE CLAUSE (1932) § 111, traces the history of this legislation and treats the cases under it.

12. 45 STAT. 1084 (1929), 49 U. S. C. A. § 60 (Supp. 1936), discussed *supra* note 8. This law merely allowed the state jurisdiction over the goods to attach upon their delivery within the state, regardless of whether they remained in the original package or not, hence preventing a sale in the original package from frustrating the state law. While not unconstitutional, the law did not interfere with the right to receive, possess, and use the goods though sale was forbidden, and it was to close this loophole that the present Act was drafted, preventing even the transportation of the goods to, and their receipt in, the specified class of states. Similar considerations led to the drafting of the second act on the interstate transportation of liquor. See Clark Distilling Co. v. Western M. Ry., 242 U. S. 311, 323, 324 (1917).

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1. Application was made for certiorari prior to review by the Circuit Court of Appeals, in an attempt to get a prompt adjudication by the Supreme Court. Certiorari having been denied, the case is now pending in the Circuit Court of Appeals for the First Circuit.

The conclusion that the tax imposed by Title IX [2] on employers of eight or more persons is an excise tax on the act of employing is well supported.[3] The tax, being indirect within the meaning of the Constitution,[4] is subject only to the requirement of uniformity.[5] A tax is uniform within the constitutional meaning of the word when it imposes the same standards of liability thereto in all sections of the United States.[6] Therefore, although a federal tax falls on only one class of persons, it is uniform if all the persons in that class are subject to it.[7] Furthermore, the only taxes that have been held invalid because of arbitrary classification are state taxes.[8] Thus it is apparent that there is nothing about the operation of the tax itself which exceeds the broad taxing power of Congress. However, the purpose of the tax and the method of achieving that purpose are grounds upon which the Supreme Court might deny its constitutionality. Title IX does not set up a federal unemployment insurance agency, but in effect it forces the states to set up state unemployment insurance agencies by permitting taxpayers to credit against 90% of the federal tax, taxes paid to the states under approved unemployment insurance plans.[9] *Florida v. Mellon* [10] stands for the proposition that there is nothing unconstitutional per se in a federal tax which forces states to enact legislation. However, Title IX not only forces the states to legislate but dictates the standards of such legislation, with a Social Security Board to determine whether the state enactments fulfill those requirements.[11] Thus Title IX might well be held to transcend the doctrine of *Florida v. Mellon* because of the method used to accomplish its purpose.[12] On the other hand, the method might be termed a plan of federal-state cooperation rather than one of coercion,[13] thus obviating the objection of federal dictation of state laws. However, the broad meaning given to coercion in the *A. A. A.* decision [14] would seem to make this interpretation highly improbable. The court in the instant case took the view that the purpose of the tax was to raise revenue.[15] However, it would hardly be necessary to look behind the face of the Act to determine that its actual purpose is to provide a nationwide system of unemployment insur-

2. 42 STAT. 639 (1935), 42 U. S. C. A. § 1101 *et seq.* (Supp. 1936). For an excellent analysis of this and other sections of the Act, see Armstrong, *The Federal Social Security Act and Its Constitutional Aspects* (1936) 24 CALIF. L. REV. 247, 248-258; *cf.* Legis. (1937) 85 U. OF PA. L. REV. 511.

3. The following are typical of the many varied taxes upheld as excises: Patton v. Brady, 184 U. S. 608 (1902) (tax on manufacturing and selling); Billings v. United States, 232 U. S. 261 (1914) (tax on using foreign built yachts); Bromley v. McCaughn, 280 U. S. 124 (1929) (tax on making gifts inter vivos).

4. See 1 COOLEY, TAXATION (4th ed. 1924) § 108.

5. U. S. CONST. Art. I, § 8, cl. 1.

6. Flint v. Stone Tracy Co., 220 U. S. 107 (1910); Brushaber v. Union Pacific R. R., 240 U. S. 1 (1915).

7. See 1 COOLEY, TAXATION (4th ed. 1924) § 111.

8. See Armstrong, *supra* note 2, at 259.

9. 42 STAT. 639 (1935), 42 U. S. C. A. § 1102 (Supp. 1936); see Note (1936) 20 MARQ. L. REV. 90, 93.

10. 273 U. S. 12 (1927). The case involved the Revenue Act of 1926, which provided a credit of the amount of inheritance taxes paid to the state up to 80% of the federal tax.

11. 42 STAT. 640 (1935), 42 U. S. C. A. § 1103 (Supp. 1936); see Note (1936) 20 MARQ. L. REV. 90, 95.

12. See Legis. (1936) 24 GEO. L. J. 665, 683.

13. See Corwin, *National-State Cooperation—Its Present Possibilities* (1937) 46 YALE L. J. 599, 622.

14. See United States v. Butler, 297 U. S. 1, 74 (1936), 84 U. OF PA. L. REV. 547.

15. See instant case at 101.

ance.[16] The dogma is that Congress may not do indirectly what it may not do directly.[17] It may not, under the guise of exercising a constitutional power such as taxation, circuitously regulate activity which it has no power directly to control. The real solution of the problem of the constitutionality of Title IX seems then to hinge on the power of Congress to create a federal unemployment insurance agency. It is probable that such a federal project would fall on the ground that it invaded the powers reserved to the states by the Tenth Amendment.[18] It is indeed difficult to see under what enumerated power delegated to Congress by the Constitution unemployment insurance could be upheld. However, if the Supreme Court should give the substantive effect to the welfare clause [19] indicated by a dictum in the *A. A. A.* decision,[20] the purpose sought to be effected by the tax levied by Title IX could be found to be within the powers of Congress.[21]

Constitutional Law—Due Process—Power of State to Prohibit Peaceable Assembly Under Auspices of Communist Party—Defendant was convicted under a criminal syndicalism statute [1] for assisting in the conduct of a meeting held under the auspices of the Communist Party. No violence or unlawful methods were advocated at the meeting, but evidence showed that the Communist doctrines embraced such methods. *Held,* that the statute, as applied, violated the "due process" clause of the Federal Constitution [2] which guarantees the rights of free speech and of peaceable assembly. *De Jonge v. Oregon,* 57 Sup. Ct. 255 (1937).[3]

This case represents another important step in the extension of the "due process" clause of the Fourteenth Amendment to safeguard from state encroachment the rights protected from Congressional impairment by the first eight amendments. Starting with a dictum in *Gitlow v. New York,*[4] the doctrine that freedom of speech and of the press are so protected has become well entrenched.[5] Although the Court once held that the guaranty of "due process" did not necessarily extend to all of the rights set forth in the "Bill of Rights"

16. See Legis. (1936) 24 GEO. L. J. 665, 679.

17. Bailey v. Drexel Furniture Co., 259 U. S. 20 (1922); Hill v. Wallace, 259 U. S. 44 (1922); see United States v. Butler, 297 U. S. 1, 69 (1936). But see McCray v. United States, 195 U. S. 27, 59 (1904); United States v. Doremus, 249 U. S. 86, 93 (1919).

18. The following discussions of the constitutionality of the old age pension plan, a federal project, would be pertinent to the constitutionality of a federal unemployment insurance plan: Armstrong, *supra* note 2, at 266 (constitutional); Denby, *The Case Against the Constitutionality of the Social Security Act* (1936) 3 LAW & CONTEMP. PROB. 315, 329 (unconstitutional).

19. U. S. CONST. Art. I, § 8, cl. 1.

20. See United States v. Butler, 297 U. S. 1, 66 (1936), 84 U. OF PA. L. REV. 547.

21. See Shulman, *The Case for the Constitutionality of the Social Security Act* (1936) 3 LAW & CONTEMP. PROB. 298, 313.

1. 1 ORE. CODE ANN. (1930) §§ 14-3,110 to 14-3,112, as amended by Ore. Laws 1933, c. 459. "Criminal syndicalism" is defined therein as the "doctrine which advocates crime, physical violence, sabotage or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution."

2. U. S. CONST. Amend. XIV.

3. Reversing State v. De Jonge, 152 Ore. 315, 51 P. (2d) 674 (1935), 24 GEO. L. J. 744 (1936).

4. 268 U. S. 652, 666 (1925).

5. Whitney v. California, 274 U. S. 357 (1927); Fiske v. Kansas, 274 U. S. 380 (1927); Stromberg v. California, 283 U. S. 359 (1931) ("red flag" law); Near v. Minnesota, 283 U. S. 697 (1931) (press); Grosjean v. American Press Co., 297 U. S. 233 (1936) (press).

amendments,[6] a dictum in the recent case of *Grosjean v. American Press Co.*[7] seemed to show an intention to inject these amendments in toto into the "due process" clause.[8] In the instant case the right of peaceable assembly is placed for the first time under its protection, not, however, because of the prohibition contained in the First Amendment, which applies only to Congress,[9] but upon the theory that, like freedom of speech and of the press, it is a "fundamental" right.[10] Thus, although there is no express rejection of the *Grosjean* dictum, the Court seems to limit the extension of "due process" to those rights which are "fundamental". This limitation by the Court of its own power to review state legislation again throws open the question as to the boundaries of the "due process" clause in the sphere covered by the "Bill of Rights", for it is far from well established which of those rights are "fundamental". The increasing prevalence of repressive legislation in recent years [11] points to the desirability of clearly defined limitations upon the power of the states to impair civil liberties. In criminal syndicalism cases involving rights of free speech and press the Court has tended to uphold state acts unless they appeared too arbitrary,[12] having rejected in such cases the oft-repeated contention of Justice Holmes that printed or spoken words should not be prohibited unless they create a "clear and present danger".[13] The Court did not in the instant case expressly apply either of these tests, but merely held that peaceful meetings where nothing unlawful is advocated cannot be declared criminal. It is not indicated what the result would have been had one of the speakers held forth upon the usual Communist theme of the inevitable future necessity of violence. Thus the extent to which the Oregon statute and other similar statutes [14] may constitutionally be applied to limit peaceable assembly is still unascertained.

Constitutional Law—Obligation of Contracts Not Impaired by North Carolina Mortgage Deficiency Judgment Act—A North Carolina statute provided that when the mortgagee or holder of an obligation secured by real estate, who has authority to sell on default, purchases directly or indirectly the mortgaged premises at such sale, a deficiency judgment is to be entered for only the difference between the fair value of the premises and the amount of the mortgage debt.[1] Plaintiff, payee of a promissory note secured by real estate, caused the property to be sold in accordance with the terms of the deed of trust

6. Twining v. New Jersey, 211 U. S. 78 (1908).

7. 297 U. S. 233, 243-244 (1936), 49 HARV. L. REV. 998, 20 MINN. L. REV. 671.

8. See Note (1936) 4 GEO. WASH. L. REV. 347, 354.

9. "Congress shall make no law . . . abridging . . . the rights of the people peaceably to assemble. . . ."

10. See instant case at 260; see also United States v. Cruikshank, 92 U. S. 542, 552 (1875).

11. For a thorough discussion of legislation of this sort see Legis. (1936) 84 U. OF PA. L. REV. 390.

12. Gitlow v. New York, 268 U. S. 652 (1925); Whitney v. California, 274 U. S. 337 (1927).

13. Schenck v. United States, 249 U. S. 47, 52 (1918); dissenting opinions: Abrams v. United States, 250 U. S. 616, 624 (1919); Pierce v. United States, 252 U. S. 239, 253 (1920); Gitlow v. New York, 268 U. S. 652, 672 (1925); concurring opinion: Whitney v. California, 274 U. S. 357, 372 (1927).

14. The Nebraska statute goes so far as to punish the mere providing of rooms to be used for such forbidden meetings. NEB. COMP. STAT. (1929) § 28-817. For a compilation of the statutes on this subject see Legis. (1936) 84 U. OF PA. L. REV. 390, 392-393.

1. N. C. CODE (Michie, 1935) § 2593 (d). The Act allows the mortgagor to set off the fair value of the premises in a suit brought by the mortgagee for a deficiency judgment.

and became the purchaser at the sale. In a suit brought for the difference between the sale price and the amount of the debt, judgment was rendered for the mortgagor, the jury having found that the fair value of the mortgaged premises was equal to the amount of the mortgage debt. *Held,* affirmed on the ground that the statute did not violate the federal constitutional restriction against impairing the obligation of contracts.[2] *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.,* U. S. Sup. Ct., (1937) 4 U. S. L. WEEK 607.

In validating the Act, the Court invoked the familiar doctrine that laws which do not operate on the substantive rights of parties to a contract but merely affect or modify remedies given to enforce those rights do not impair the obligation of contracts within the meaning of the Constitution.[3] The Court reasoned that since the statute did not apply to foreclosure sales in equity, it did not impair substantive rights by modifying an alternative remedy allowed by state law. But it is to be noted that in foreclosure proceedings, under North Carolina law, the court could refuse to confirm a sale if the highest bid was inadequate;[4] whereas, previous to the statute, the court had no such power over a sale by a mortgagee according to the terms of the trust deed.[5] Hence, to the extent that the Court held that there was no impairment of contract rights in limiting the broader remedy in the latter situation, the instant case would seem contrary to the recent decision of the Pennsylvania Supreme Court in *Beaver County Bldg. & Loan Ass'n v. Winowich,*[6] criticized in a recent issue of the REVIEW.[7]

Constitutional Law—Validity of the Establishment of Minimum Wages by Means of a Regulation of Unfair Competition—Under the authority granted him by a state statute,[1] the Governor of Wisconsin promulgated a code of fair competition for the intra-state business of the barber industry, which included a minimum wage requirement. The defendant, a barber, having paid his employees less than the set standard, an action was instituted to compel him to cease and desist his violation of the code. *Held* (Fowler, Nelson, and Fairchild, JJ. dissenting), that the establishment of minimum wages in order to prevent unfair competition does not violate the Fourteenth Amendment of the federal constitution.[2] *State ex rel. Attorney General v. Fasekas,* 269 N. W. 700 (Wis. 1936). A similar regulation of the painting, paper hanging, and decorating industry, made under the same authority, was also held valid. *State ex rel. Attorney General v. Noyes,* 269 N. W. 710 (Wis. 1936).

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2. U. S. CONST. Art. I, § 10.

3. See Sturges v. Crowninshield, 4 Wheat. 122, 200 (U. S. 1819); Von Hoffman v. City of Quincy, 4 Wall. 535, 553-554 (U. S. 1866); Feller, *Moratory Legislation : A Comparative Study* (1933) 46 HARV. L. REV. 1061, 1069; Bunn, *The Impairment of Contracts: Mortgage and Insurance Moratoria* (1933) 1 U. OF CHI. L. REV. 249, 251.

4. See instant case at 607; Woltz v. Asheville Safe Deposit Co., 206 N. C. 239, 241, 173 S. E. 587, 589 (1934).

5. Instant case at 607.

6. 323 Pa. 483, 187 Atl. 481 (1936).

7. (1936) 85 U. OF PA. L. REV. 114. The whole tenor of the Court's opinion in the instant case seems contrary to that of the Pennsylvania Supreme Court. See, especially, instant case at 608.

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1. Wisconsin Laws 1933, c. 110, *amended by* Wisconsin Laws 1935, c. 182.

2. Although the court did not rule that the minimum wage legislation was constitutional, because the case was decided upon an error in the procedure of taking the appeal, the dissenting opinion, and the greater part of the majority opinion was devoted to the judges' viewpoints on the question of this particular method of wage regulation.

The instant cases are the most recent decisions by state courts upholding minimum wage legislation [3] despite the fact that, in earlier rulings upon similar enactments,[4] the Supreme Court has unequivocally denied to both the state and federal governments the power to regulate wages.[5] Although the attempt to circumvent these decisions has assumed a new guise, it is improbable that the mere declaration of a different purpose for the legislation will render it constitutional. However, the case of *Morehead v. Tipaldo* [6] has indicated a possibility in the direction [7] of a future relaxation of the harsh, unqualified rule against such enactments.[8] And if this tendency be extended, the instant case is sufficiently distinguishable to enable the Court to affirm these decisions without openly rejecting its prior adjudications, for under the Wisconsin Act, unlike all other minimum wage statutes, the Governor establishes a scale of wages as an incident of his undoubted power to eliminate methods of unfair competition.[9] Furthermore, if it be found as a fact that a minimum wage is essential to the establishment of fair trade practices, then, since the prevention of unfair competition vitally affects the public interest, the maintenance of minimum wage standards would be a valid exercise of the state's power to intercede in any situation in which the public is sufficiently interested.[10] However, it is difficult to find any connection between the superior ability of an employer to bargain with his employees, and the violation of principles of fair competition.[11] And unless there is some such relationship, the establishment of minimum wages under this procedure is invalid because the Governor has thereby exceeded his authority to make regulations necessary for codes of fair competition.

Contracts—Effect Upon Previously Formed Illegal Agreements of Statute Legalizing Such Agreements—Plaintiff, assignee of the claim, brought suit for the purchase price of liquor which had been sold and delivered to defendant before the repeal of the Eighteenth Amendment. *Held,* that the Volstead Act had, in such situations, merely afforded the defense of illegality to

3. Heretofore, the states which enacted minimum wage laws have done so in the hope that the Supreme Court would reject the broad language of the *Adkins* case, or in the belief that a statement in the preamble of the act that the law was an exercise of their police power would render it constitutional. 8 WASH. REV. STAT. (Remington, 1931) tit. 50, § 7624½, Parish v. West Coast Hotel Co., 55 P. (2d) 1083 (Wash. 1936), 85 U. OF PA. L. REV. 117; N. Y. CONS. LAWS (Cahill, Supp. 1935) c. 32, §§ 550-567, Morehead v. People *ex rel.* Tipaldo, 56 Sup. Ct. 918 (1936). See *Minimum Wage Laws* (1936) 26 AM. LAB. LEG. REV. 84.

4. Adkins v. Children's Hospital, 261 U. S. 525 (1923), 71 U. OF PA. L. REV. 360; Morehead v. People *ex rel.* Tipaldo, 56 Sup. Ct. 1918 (1936), *pet. for rehearing denied,* 4 U. S. L. WEEK 121; see (1936) 13 N. Y. U. L. Q. REV. 613.

5. The *Adkins* case held unconstitutional a federal minimum wage law, and the *Morehead* case held unconstitutional a state minimum wage law.

6. 56 Sup. Ct. 918 (1936).

7. This possibility is indicated in the Court's refusal to consider whether the *Adkins* case should be overruled unless the appellant so requested. Instead, the Court limited its opinion to ruling that the *Adkins* case applied to state as well as to federal legislation.

8. Mr. Justice Holmes, in his dissenting opinion in the *Adkins* case, pointed out that the question decided by the majority was: "Whether Congress can establish minimum rates of wages . . . or whether . . . Congress had no power to meddle with the matter at all," [261 U. S. 525, 567 (1923)], and the majority said in answer to this question that, ". . . the authority to fix hours of labor cannot be exercised. . . ." 261 U. S. 525, 554 (1923).

9. *In re* Petition of State *ex rel.* Attorney General, 220 Wis. 25, 264 N. W. 633 (1936).

10. Nebbia v. New York, 291 U. S. 502 (1934), 82 U. OF PA. L. REV. 619; Goldsmith & Winkle, *Price Fixing: From Nebbia to Guffey* (1936) 31 ILL. L. REV. 179.

11. A regulation of the wages of labor is a regulation of the cost of one of the elements which goes into manufacture. Therefore, if wages are considered a trade practice, then the price paid for raw materials, too, should be considered subject to control because it is as intimately associated with fair trade practices.

actions brought on the alleged contracts, which defense was no longer available, so that the plaintiff was entitled to recover. *Lido Capital Corp. v. Eskelsen,* N. Y. Sup. Ct., N. Y. L. J., Dec. 22, 1936, p. 2335, col. 6.

Recognizing the existence of a divergency of judicial attitudes on the question of whether an agreement, illegal at its inception, is rendered enforceable by a legislative enactment legalizing the formation of such agreements,[1] the instant court purported both to apply firmly established New York law and also to follow the Restatement. As a matter of fact, it did neither; for there are conflicting New York decisions [2] and the Restatement positively advocates a contrary ruling.[3] The present ruling is based upon the theory that an illegal bargain is not enforceable because both parties have been guilty of unlawful conduct in entering into the agreement, and that it is against the policy of the courts to lend aid to either wrongdoer; but that, after the status of the law has so changed that such conduct is no longer to be considered wrongful, the policy impelling the courts to withhold their aid no longer exists. However, the prevailing rule denies recovery in such cases.[4] The orthodox rationalization of this view is that there never was a contract because the defendant had been given no valid consideration for his promise; consequently, a later change in the law could not make something of this transaction which was, in the eyes of the law, a nullity. Since our contract law is fundamentally based upon the theory that a promisor

1. Unquestionably, of course, a statute with a retroactive saving clause can validate such bargains. RESTATEMENT, CONTRACTS (1932) § 609, quoted *infra* note 3. The instant court admitted the absence of any such saving clause in the Twenty-first Amendment to the Federal Constitution.

2. The court cited New York decisions enunciating this rule but apparently overlooked two decisions which are *contra.* The decisions sanctioning recovery on the contract: Bloch v. Frankfort Distillery, 247 App. Div. 864 (1st Dep't, 1936) (a liquor contract; decided without opinion); Curtis v. Leavitt, 15 N. Y. 9 (1857) (constantly cited in the other decisions but which interpreted the statute in question as being retroactive; see *id.* at 152-154, 254); Central Bank v. Empire Stone Dressing Co., 26 Barb. 23 (Sup. Ct. 1857); Washburn v. Franklin, 35 Barb. 599 (Sup. Ct. 1861); Hoppock v. Stone, 49 Barb. 524 (Sup. Ct. 1867); Bock v. City of New York, 31 Misc. 55 (Sup. Ct. 1900).

The two decisions propounding the opposite view, which are not alluded to in the other decisions, are: Bailey v. Mogg, 4 Denio 60 (Sup. Ct. 1847); New York, etc. R. R. v. Van Horn, 57 N. Y. 473 (1874).

It was said in 1913, in a very able note on this topic, that New York law seemed reasonably well settled that the repeal of a statute making a contract illegal takes away the defense of illegality, as though the statute had never existed. ANN. CAS. 1913C, 1398, at 1406.

3. RESTATEMENT, CONTRACTS (1932) § 609.

The instant court cites § 598 for the proposition that the general statement to the effect that illegal contracts are void is inaccurate and that the true basis for the denial of recovery is that the law denies relief to a party founding his cause of action on his own immoral or illegal act. This appears in the Comment to that section which itself states: "A party to an illegal bargain can neither recover damages for breach thereof nor, by rescinding the bargain, recover the performance that he has rendered thereunder or its value, except as stated in §§ 599-609." The latter sections state exceptions to the general rule laid down in § 598, such as: when one party is justifiably ignorant of the illegality of the bargain and the other is not (§ 599), when the illegality is slight (§ 600), when the illegal provision is unessential (§ 603), etc. The statement in the Comment to § 598, it would seem, is an explanation of the theoretical basis for these exceptions.

§ 609 reads: "A bargain that is illegal when formed does not become legal . . . (b) by reason of a change of law, except where the Legislature manifests an intention to validate the bargain."

4. Ludlow v. Hardy, 38 Mich. 690 (1878) (promise to pay for illegally delivered liquor was re-expressed after the repeal of the statute making it illegal); Schaun v. Brandt, 116 Md. 560, 82 Atl. 551 (1911); Wood v. Imperial Irrig. Dist., 216 Cal. 748, 17 P. (2d) 128 (1932), 46 HARV. L. REV. 1340 (1933) ("consideration" having passed, the promise was re-expressed after repeal of the statute). *Contra:* Ewell v. Daggs, 108 U. S. 143 (1883).

It is to be noted that, according to the majority view, promisor's repetition of the promise after the law has been changed so that such a bargain would form a contract is of no consequence.

is not legally bound by his promise unless some valid consideration was given as the price of the promise [5] and since an illegal act or promise is not, aside from those rare cases in which exceptions are made in order to prevent great injustice,[6] valid consideration,[7] it seems manifest that this latter view is the proper judicial analysis of such transactions.

Corporation Law—Constitutionality of Amendment to Certificate Canceling Accrued Undeclared Dividends and Made Subsequent to Purchase of Cumulative Preferred Shares—Plaintiff held second preferred shares in the defendant corporation on which dividends had begun to accumulate in 1930. In 1927, after the issuance of the shares and their acquisition by the plaintiff, the Delaware Corporation Laws were amended to confer upon the majority of shareholders of any corporation the power to alter the certificate of incorporation by changing ". . . the preferences, or relative, participating, optional, or other special rights of the shares, or the qualifications, limitations, or restrictions of such rights . . . ." [1] In 1935, when the accumulated dividends amounted to $21.25 per share, the articles of association were amended over the plaintiff's objection, so as to cancel the accrued dividends and convert the second preferred shares into common shares. Dividends were then declared on all except the second preferred shares which, because of the objection of the holders thereof, had not been converted. The plaintiff sued to recover the accumulated dividends on his shares. *Held,* that the amendment to the articles of incorporation was void in so far as it purported to deprive the plaintiff of his right to dividends accrued up to that time, because such deprivation of vested rights would be unconstitutional.[2] *Keller v. Wilson & Co.,* Sup. Ct. Del., November 10, 1936.

The *Morris* case [3] in 1923 decided that as soon as the agreed dividend period had elapsed there was a "vested right" to its ultimate payment as against those who had agreed to its payment, that it was "a present property interest", and that consequently such a dividend could not be canceled. The Delaware Corporation Law was subsequently amended,[4] but in 1929 the federal court, in a case involving this amended statute, held that the elimination of sinking fund provisions for the benefit of preferred shareholders, where such amendment was not authorized by the corporation law at the time the company was incorporated,

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5. RESTATEMENT, CONTRACTS (1932) § 19; 1 WILLISTON, CONTRACTS (1936) § 99.

6. These exceptional situations are specified in RESTATEMENT, CONTRACTS (1932) §§ 599-609. See *supra* note 3.

7. Hazelton v. Sheckells, 203 U. S. 71 (1906); RESTATEMENT, CONTRACTS (1932) § 80.

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1. 35 Del. Laws 1927, c. 85, § 10, *amending* DEL. REV. CODE (1915) c. 65, § 26. DEL. REV. CODE (1915) c. 65, § 82 reserves the right to the legislature to alter, amend, or repeal. On the matter of legislative substitution of the rule of majority control for the rule of unanimous consent, see Dodd, *Dissenting Stockholders and Amendments to Corporate Charters* (1927) 75 U. OF PA. L. REV. 723, 728.

2. The court, without referring to particular provisions, said that vested property rights were secured by the Federal and State Constitutions. This was undoubtedly intended to refer to the "due process" clauses of both constitutions. U. S. CONST. Amend. XIV; DEL. CONST. Art. I, § 7.

3. Morris v. American Public Utilities Co., 14 Del. Ch. 136, 122 Atl. 696 (1923), 8 MINN. L. REV. 617 (1924) (cited by error under the name of *Harden v. Eastern States Public Service Co.*).

4. See *supra* note 1.

was an impairment of the obligation of contracts.[5] However, the *Davis* case[6] earlier held that because of the public interest in the continued existence of corporations, an amendment to the certificate which changed dividend preferences was valid, even though it affected the purely private contract between shareholders *inter se*.[7] And a federal court in 1933[8] held that the same amended statute was broad enough to validate the abrogation of dividends on preferred shares by means of the issuance of new prior preferred shares. The result in the instant case was reached by reasoning that the right to accumulated dividends was a "vested property right", yet it is apparent that only those rights are "vested" which are protected, so that this test is meaningless, since it assumes its conclusion. However, this decision shows that the Delaware court is not prepared, even under the broad terms of the Delaware law, to allow the absolute destruction of the rights of dissenting minority shareholders to accumulated dividends. It is submitted that the validity of an amendment of this kind should be determined by deciding whether or not it is necessary to the protection of third persons, as, for example, creditors whose rights stand upon a higher footing than that of the group which is to be prejudiced by the action.

Criminal Procedure—Common Law Right of Attorney General to Supersede District Attorney—Under a statute authorizing the Attorney General to appoint a special attorney in criminal cases when requested to do so by the president judge,[1] the Attorney General appointed himself as prosecutor and procured the indictment of certain individuals for murder. The latter then began quo warranto proceedings, challenging the right of the Attorney General to designate himself as special attorney. *Held,* that the Attorney General rightfully appointed himself special attorney under the statute,[2] and that, aside from the statute, he possessed common law powers to prepare and try criminal cases, although it was necessary to supersede the District Attorney in so doing. *Commonwealth ex rel. Minerd v. Margiotti; Commonwealth ex rel. Reilly v. Same,* 188 Atl. 524 (Pa. 1936).

That the Attorney General had extensive powers in criminal prosecutions under the English common law is conceded,[3] but it is held in a number of American states that the Attorney General today has no powers derived from the

5. Yoakam v. Providence Biltmore Hotel Co., 34 F. (2d) 533 (D. R. I. 1929). Accord: Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 N. E. 443 (1909). See Dodd, *supra* note 1, at 746.

6. Davis v. Louisville Gas & Elec. Co., 16 Del. Ch. 157, 142 Atl. 654 (1928), cited by BERLE & MEANS, THE MODERN CORPORATION & PRIVATE PROPERTY (1933) 211, as proceeding "on some vague theory that the State's interest in fostering business allowed the grant of rights to an intra-corporate group to change the agreement as against their associates which the state itself probably did not have."

7. See Morris v. American Public Utilities Co., 14 Del. Ch. 136, 144, 122 Atl. 696, 700 (1923).

8. Harr v. Pioneer Mechanical Corp., 65 F. (2d) 332 (C. C. A. 2d, 1933), 28 ILL. L. REV. 422.

1. PA. STAT. ANN. (Purdon, 1930) tit. 71, § 297.

2. The court stated that the Attorney General's designation of himself as special prosecutor under the statute was not necessary in view of his broad common law powers, and that the statute did not curtail those powers but merely provided a manner for their exercise. See instant case at 530, 531.

3. See People v. Miner, 2 Lans. 396, 398 (N. Y. Sup. Ct. 1868); De Long, *Powers and Duties of the State Attorney-General in Criminal Prosecution* (1934) 25 J. CRIM. L. 358, 363-365.

common law but only those given him by statute.[4] In other jurisdictions it is held that where a statute grants to the District Attorney powers formerly exercised by the Attorney General under the English common law those powers are deemed taken away from the Attorney General,[5] and it is consequently declared that the Attorney General may not supersede the District Attorney in the exercise of those powers expressly granted to the latter.[6] Other courts, however, have recognized the doctrine of "implied common law powers",[7] whereby the Attorney General may supersede the local prosecutor virtually at will. In Pennsylvania, prior to the instant case, it had been established that the Legislature had the power to provide by statute for situations in which the District Attorney might be displaced,[8] but whether the Attorney General retained all his powers under the common law was not settled, though his right of "general supervision" over a District Attorney's performance of his duties was admitted.[9] The instant case decided that the Attorney General did retain those powers.[10] It has been argued that, from a practical point of view, an attempt by an Attorney General to control a District Attorney's preparation and trial of a criminal case might result in friction between the two officials, "buck passing", and delay.[11] But as the activities of the modern criminal, no longer localized, have many ramifications,[12] a central prosecuting authority is very essential, and this decision, in fostering the development of such an authority, is to be approved.

Criminal Procedure—Constitutionality of the New Jersey Alternate Juror Act—The New Jersey Alternate Juror Act provides in substance that, in a criminal trial, at the discretion of the trial judge, a jury not to exceed fourteen members may be empaneled to sit and hear the cause; that, if it be necessary, one or two may be excused; and that from those remaining after the charge of the court, twelve shall be chosen by lot to render the verdict.[1] Defendants, con-

4. State v. Snyder, 172 Wis. 415, 179 N. W. 579 (1920); see Julian v. State, 122 Ind. 68, 72, 23 N. E. 690, 692 (1890); Cosson v. Bradshaw, 160 Iowa 296, 302, 141 N. W. 1062, 1064 (1913). The New Mexico Supreme Court declared that the doctrine of implied common law powers of the Attorney General is based upon the fact of the existence of the office prior to a definition of its powers, and that where the statute creating the office defines its duties, the holder of the office has no common law powers. See State v. Davidson, 33 N. M. 664, 667, 275 Pac. 373, 375 (1929).

5. State v. Seattle Gas & Electric Co., 28 Wash. 488, 68 Pac. 946 (1902); State v. Ehrlick, 65 W. Va. 700, 64 S. E. 935 (1909).

6. See State v. Ehrlick, 65 W. Va. 700, 702, 64 S. E. 935, 936 (1909).

7. Kansas v. Finch, 128 Kan. 665, 280 Pac. 910 (1929); State *ex rel.* Young v. Robinson, 101 Minn. 277, 112 N. W. 269 (1907); Gibson v. Kay, 68 Ore. 589, 137 Pac. 864 (1914).

An early case, often cited to support the proposition that the Attorney General retained common law powers, was a New York Supreme Court decision, wherein it was stated: "As the powers of the attorney general, were not conferred by statute, a grant by statute of the same or other powers, would not operate to deprive him of those belonging to the office at common law, unless the statute, either expressly, or by reasonable intendment, forbade the exercise of powers not thus expressly conferred." People v. Miner, 2 Lans. 396, 399 (Sup. Ct. 1868). This theory was ignored by the Appellate Division in the case of Ward Baking Co. v. Western Union Telegraph Co., 205 App. Div. 723, 200 N. Y. Supp. 865 (3d Dep't, 1923), but recently found strong support in the case of People v. Tru-Sport Pub. Co., 291 N. Y. Supp. 449 (Sup. Ct. 1936).

8. See Commonwealth v. Lehman, 309 Pa. 486, 492, 164 Atl. 526, 528 (1932).

9. See Commonwealth v. Lehman, 309 Pa. 486, 493, 164 Atl. 526, 528 (1932). But *cf.* Snyder's Case, 301 Pa. 276, 289, 152 Atl. 33, 37 (1930).

10. Instant case at 530.

11. See State v. Ehrlick, 65 W. Va. 700, 703, 64 S. E. 935, 936 (1909).

12. See People v. Tru-Sport Pub. Co., 291 N. Y. Supp. 449, 461 (Sup. Ct. 1936).

1. N. J. Laws 1935, c. 287, §§ 1, 2, 3.

victed of murder in the first degree by a jury so chosen,[2] contend that the statute is unconstitutional. *Held* (by a nine to six vote), that the statute did not contravene the constitutional provision that "the right of trial by jury shall remain inviolate . . . ." [3] *State v. Dolbow and Driscoll,* N. J. Ct. of Err. & App., February 2, 1937.[4]

It is well settled that the phrase "trial by jury" means a trial as understood and applied at common law.[5] Beyond all doubt, the petit jury at common law consisted of twelve men [6] whose functions included not only the determination of the verdict, but also the hearing of the evidence.[7] Under the statute in question, whereas twelve jurors render the verdict, fourteen hear all or part of the evidence. Since it has been held that a body of less than twelve is not a common law jury,[8] it would seem that to allow more than twelve to exercise the function of hearing the evidence is repugnant to the constitutional provision guaranteeing a jury trial as at common law. In reaching the opposite result, the majority [9] of the court reasoned that the statute, though different in form, corresponded in substance with those whose constitutionality has been upheld in other jurisdictions.[10] However, with the single exception of Michigan,[11] where the constitutional provision differs from that in New Jersey,[12] these other jurisdictions provide for the empaneling of only twelve jurors and make additional provisions for alternates,[13] so that under these enactments, only twelve men

2. No necessity for any substitution arose during the trial, and two of the fourteen originally chosen took no part in the rendition of the verdict.

3. N. J. CONST. Art. I, par. 7.

4. On Feb. 10, 1937, the New Jersey Court of Errors and Appeals granted a stay of execution pending the determination of the United States Supreme Court on defendants' application for a writ of certiorari. Phila. Evening Public Ledger, Feb. 10, 1937, p. 21, col. 4.

5. Patton v. United States, 281 U. S. 276, 288 (1930).

6. Thompson v. Utah, 170 U. S. 343, 350 (1898).

7. Capital Traction Co. v. Hof, 174 U. S. 1, 13 (1899); Opinion of the Justices, 41 N. H. 550, 551 (1860); Lamb v. Lane, 4 Ohio St. 167, 177 (1854). See 3 BLACKSTONE, COMMENTARIES (15th ed. 1809) 365; 1 HALE, HISTORY OF THE PLEAS OF THE CROWN (1800) 33.

8. Rasmussen v. United States, 197 U. S. 516 (1905); see Thompson v. Utah, 170 U. S. 343 (1898).

9. The dissenting opinion attacked the Act on the sole ground that the power given therein to the court to discharge jurors from the box for any reason which in its opinion justified the excusal was too broad, and the point as to whether the fact that fourteen heard the evidence violated the constitutional provision here in question was not treated.

10. People v. Peete, 54 Cal. App. 333, 202 Pac. 51 (1921); People v. Howard, 211 Cal. 322, 295 Pac. 333 (1930); People v. Mitchell, 266 N. Y. 15, 193 N. E. 445 (1934); State v. Dalton, 206 N. C. 507, 174 S. E. 422 (1934).

11. 3 MICH. COMP. LAWS (1929) § 17311. The instant statute is worded practically the same as this Michigan Act.

12. The Michigan Constitution provides: "In every criminal prosecution, the accused shall have a right to a speedy and public trial by an impartial jury. . . ." MICH. CONST. Art. II, § 19. It is to be noted that this does not require, as does the New Jersey Constitution, that trial by jury remain *inviolate.*

13. Statutes in most jurisdictions are patterned after the form presented by the American Law Institute. See CODE OF CRIMINAL PROCEDURE (Am. Law Inst. 1930) § 285. This provides in substance that in a criminal case, after the regular jury is sworn and empaneled, alternates be drawn, to sit as jurors only if and when, for stated reasons, a regular juror is withdrawn. This provision is found in substance in the following states: ARIZ. REV. CODE (Struckmeyer, 1928) § 5041; CAL. PEN. CODE (Deering, 1931) § 1089; 1 IDAHO CODE ANN. (1932) tit. 19, § 1804; Neb. Laws 1933, c. 38; N. Y. CODE OF CRIM. PRO. (Cahill, Supp. 1936) § 358-a; 5 NEV. COMP. LAWS (Hillyer, 1929) § 10957; OHIO CODE ANN. (Throckmorton's Baldwin, 1934) § 11431-1; 1 ORE. CODE ANN. (1930) tit. 13, §§ 913-915; 1 S. D. COMP. LAWS (1929) § 4867-A; UTAH REV. STAT. ANN. (1933) tit. 48, § 0-6; Vt. Laws 1935, 65; 4 WASH. REV. STAT. ANN. (Remington, 1931) tit. 13, § 2137-1; WYO. REV. STAT. ANN. (1931) Art. 3, § 61-301.

The Federal Congress has enacted a substantially similar statute. 47 STAT. 380 (1932), 28 U. S. C. A. § 417-a (Supp. 1936).

comprise the jury, as at common law, and not fourteen, as under the New Jersey law. Therefore, despite the wholesome effect of the statute in facilitating the administration of the criminal law by preventing undue delay and needless expense, it would seem that the instant Act clearly violates the constitutional provision guaranteeing the right of trial by a common law jury.

Insurance—Lower Dividends to Holders of Policies Having Disability Benefits Not Discrimination—The plaintiff's life insurance policy provided for the payment of a total annual premium which included an extra premium for disability benefits. In accordance with the "contribution" method, the defendant, a mutual life insurance company, distributed the divisible surplus of the company to the policyholders in the proportion in which they had contributed thereto. Since 1931, the company had paid less dividends to the holders of policies with disability benefits, on the ground that the premiums received for life insurance had contributed to the surplus, while the extra amount received for disability benefits had been less than the cost of furnishing those benefits, and, therefore, had in fact reduced the surplus.[1] Plaintiff contended that this practice was in violation of a statute that required dividends to be apportioned "equitably",[2] and was contrary to a statute barring discrimination.[3] *Held* (Crane, C. J. and Finch, J., dissenting), that this apportionment of the divisible surplus was not inequitable or discriminatory. *Rhine v. New York Life Ins. Co.*, N. Y. Ct. App., (1936) 4 U. S. L. WEEK 536.

It seems well settled that the surplus of a mutual life insurance company belongs equitably to the policyholders in the proportion in which they contributed to it.[4] Since in the instant case the plaintiff contributed less to the surplus than the holder of a straight life insurance policy, the majority of the court was of the opinion that it was "equitable" that less dividends should be paid to him and that after the apportionment has been made, the courts will not interfere unless there has been bad faith, or wilful neglect, or abuse of discretion.[5] The dissenting opinion [6] was based on the ground that a payment of an additional amount was being exacted from the policyholders with disability benefits by deducting that amount from the dividends on the life insurance policy, thus amounting to either a breach of contract or a violation of the statutes. The

Pennsylvania's statute differs only in that it is applicable to both civil and criminal trials. PA. STAT. ANN. (Purdon, 1936) tit. 17, § 1153. So also: 2 COLO. ANN. STAT. (Courtright's Mills, 1930) § 4269a; N. M. Laws 1935, p. 60.

1. The plaintiff's annual premium of $27.34 for life insurance resulted in an average excess payment of $7.67 annually over the cost of furnishing life insurance, thus contributing "$30.67" (sic) to the divisible surplus of the company from 1931 to 1934, while the annual premium of $2.96 for disability benefits resulted in an annual deficit of $2.27, and thus over the same period depleted the divisible surplus $9.08.

2. N. Y. CONS. LAWS (Cahill, 1930) c. 30, § 83.

3. N. Y. CONS. LAWS (Cahill, 1930) c. 30, § 89, which provides: "No life insurance corporation doing business in this State shall make or permit any discrimination between individuals of the same class or of equal expectation of life, in the amount or payment or return of premiums or rates charged . . . or in the dividends or any benefits payable thereon. . . ."

For a collection of prohibitory statutes and cases involving them, see 3 COUCH, INSURANCE (1929) §§ 584, 585.

4. United States Life Ins. Co. v. Spinks, 126 Ky. 405, 96 S. W. 889 (1907), *writ of error dismissed*, 209 U. S. 539 (1908); Zinn. v. Germantown Farmers' Mut. Ins. Co., 132 Wis. 86, 11 N. W. 1107 (1907); see Miller v. New York Life Ins. Co., 179 Ky. 246, 253, 200 S. W. 482, 486 (1918).

5. Greeff v. Equitable Life Assur. Soc., 160 N. Y. 19, 54 N. E. 712 (1899).

6. The dissenting opinion was erroneously reported as the opinion of the court in (1937) 4 U. S. L. WEEK 546.

fallacy of this view is that it attempts to divide the policy into two contracts, which cannot be done since the stipulation for disability benefits is completely dependent upon the provision for life insurance. Moreover, the dissenting judges, although professing to acknowledge the "contribution" method of distributing the divisible surplus, in reality disregard it to reach their conclusion. The effect of adopting the minority view would be that policy holders with disability benefits would actually pay less than the cost of insurance and to meet the deficit, a minority of the defendant's policyholders would be required to pay more than the cost of insurance furnished them.[7] Such a result would seem contrary to the purpose of the mutual plan of life insurance—to furnish to the policyholders insurance at actual cost. However, the majority of the court, in the last paragraph of its opinion, states that other insurance companies still apportion dividends equally between policyholders with and those without disability benefits, and that both methods are within the range of discretion accorded to the companies in distributing their surplus. It is submitted that this conclusion is illogical, since the arguments indicating the equitableness of the defendant's system of apportionment of dividends clearly demonstrate that the method approved by the minority of the court is inequitable.

Taxation—"First In First Out" Rule for Identifying Shares in Computing Gains from Stock Sales for Income Tax Purposes—In 1928 petitioner owned 7300 shares of common stock, received as a bonus upon the acquisition of preferred stock. Later, by virtue of his ownership of the common stock, he received and exercised stock rights, purchasing 36,500 shares of common stock at $6 a share, or a total cost of $219,000. After he had sold 2600 shares of the bonus stock and 1200 of the shares purchased under the above rights, the remaining shares were converted into street certificates, incapable of identification. A controversy then arose over the method of ascertaining the acquisition cost of 5000 shares subsequently sold for $100,000, as a step in computing the taxable profit from the transaction. Petitioner contended that the "average" method should be used, whereby the 7300 shares of bonus stock to which no cost is given [1] and the 36,500 shares acquired under the stock rights would be grouped together, resulting in an average cost of $5.00 a share and a total acquisition cost of $25,000, leaving a taxable profit of $75,000. The Commissioner, on the other hand, ruled that the "first in first out" rule applied, resulting in 4700 shares of bonus stock at no cost and 300 shares of the later acquired stock at $6.00 a share, a total acquisition cost of $1800, leaving a taxable profit of $98,200. *Held,* that the "first in first out" rule was applicable, since the shares were of different cost bases and incapable of identification. *Keeler v. Commissioner of Internal Revenue,* 86 F. (2d) 265 (C. C. A. 8th, 1936).

The "first in first out" rule is applied to determine the acquisition cost of shares sold where there have been purchases of shares at different costs and such a commingling of the stock that the shares sold are not identifiable as those acquired in a particular transaction; in such instances the shares first acquired are presumed to be the first to be sold.[2] While averaging of the costs of the entire

7. Of the 2,600,000 outstanding policies of the defendant company, about 1,000,000 provide life insurance only, while 1,600,000 provide in addition disability benefits.

1. The preferred stock had been sold and the entire cost thereof applied against the sale price. Under U. S. Treas. Reg. 94, Art. 22 (a)-8 such an action appears unwarranted, but it was approved by the Commissioner. Instant case at 265.

2. U. S. Treas. Reg. 94, Art. 22 (a)-8; C. C. H. 1937 Fed. Tax Guide Serv. ¶ 522.

mass of shares has occasionally been permitted,[3] the "first in first out rule", although admittedly arbitrary, is preferred.[4] The petitioner based his argument that the cost of the bonus stock and the cost of the stock purchased with subscription rights should be averaged [5] on the proposition, recognized by the court,[6] that stock purchased with subscription rights is acquired at a cost equivalent to the sum of the money paid therefor and the value of the subscription rights.[7] Yet it is evident that a distinction must be made between apportionment of cost for the purpose of ascertaining the true cost of subscription rights stock, and averaging to ascertain the acquisition cost of an entire group of commingled shares. Since in the instant case the bonus stock by virtue of which the petitioner received the subscription rights was of no cost,[8] it can hardly be argued that any cost could be apportioned to the subscription rights, and no reason appears for averaging the costs of the two lots of stock merely because one of the lots consists of subscription rights stock. It is obvious that before the "first in first out" rule may be applied, the acquisition cost of each lot of shares must be determined, and for that purpose only does the distinction between shares acquired under subscription rights and other shares become material.

3. Ayer v. Blair, 25 F. (2d) 534 (App. D. C. 1928) (purchase of stock followed by exercise of subscription rights); V. J. Bulleit, 3 B. T. A. 631 (1926) (part of shares acquired through exercise of stock rights); C. C. H. 1937 Fed. Tax Guide Serv. ¶ 522.

4. 351 C. C. H. Fed. Tax Serv. ¶ 68.032. Although in view of the accelerating tax rates it seems more equitable to permit distribution of the cost over the entire mass of shares, the "first in first out" rule has been held reasonable and binding. Skinner v. Eaton, 45 F. (2d) 568 (C. C. A. 2d, 1930); Commissioner v. Merchants' & Manufacturers' Fire Ins. Co., 72 F. (2d) 408 (C. C. A. 3d, 1934); see Perkins v. United States, 12 F. Supp. 481, 488 (Ct. Cl. 1935).

5. The argument is based on Miles v. Safe Deposit & Trust Co., 259 U. S. 247 (1922), yet that case is clearly applicable solely to the sale of unexercised subscription rights.

6. Instant case at 266.

7. See Todd v. Commissioner, 72 F. (2d) 998, 999 (C. C. A. 3d, 1934) to the effect that stock subscription rights are obtained with part of the original capital investment. See also Perkins v. United States, 12 F. Supp. 481 (Ct. Cl. 1935) for a discussion of the *Miles* case (*supra* note 5) and a situation comparable to the instant case.

8. See *supra* note 1.